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IN THE

Supreme Court of the United States

OCTOBER TERM 1969

No. 1136

DEBORAH A. NORTHCROSS, *et al.*,

Petitioners,

v.

BOARD OF EDUCATION OF
THE MEMPHIS, TENNESSEE CITY SCHOOLS,

Respondents.

MOTION TO ADVANCE AND PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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BOARD OF EDUCATION OF
THE MEMPHIS, TENNESSEE CITY SCHOOLS,

Respondents.

MOTION TO ADVANCE

Petitioners, by their undersigned counsel, respectfully move that the Court advance its consideration and disposition of this case, which presents issues of national importance about which the court below and other United States Courts of Appeals are divided in their interpretation of *Alexander* v. *Holmes County Bd. of Educ.*, 396 U.S. 19 (1969) and *Carter* v. *West Feliciana Parish School Bd.*, No. 944 O.T. 1969 (January 14, 1970). These issues require prompt resolution by this Court for the reasons stated in the annexed Petition for Writ of Certiorari.

WHEREFORE, petitioners pray that the Court:

1. Consider this motion immediately;

2. shorten the time for filing respondents' response to the annexed petition and

3. consider the annexed petition at the Court's conference of February 20, 1970.

Respectfully submitted,

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No. .....

Deborah A. Northcross, *et al.*,

Petitioners,

v.

Board of Education of
the Memphis, Tennessee City Schools,

Respondents:

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on December 19, 1969.

Opinions Below

The orders of the United States Court of Appeals for the Sixth Circuit remanding the cause to the district court and denying petitioners' Motion for Injunction Pending Certiorari, of which review is sought, are unreported and are reproduced in the Appendix, *infra* at pp.1a-8a. The opinion of the United States District Court for the Western District of Tennessee is unreported and is also reproduced in the Appendix, *infra* at pp. 9a-23a.

Prior reported opinions in this matter are found at 302 F.2d 818 (6th Cir.), *cert. denied*, 370 U.S. 944 (1962) and 333 F.2d 661 (6th Cir. 1964).

Jurisdiction

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1). The judgment of the Court of Appeals was entered December 19, 1969 (*infra* at 4a).

Questions Presented

1. In light of the decisions of this Court in *Alexander* v. *Holmes County Bd. of Educ.*, 396 U.S. 19 (1969) and *Carter* v. *West Feliciana Parish School Bd.*, No. 944 O.T. 1969 (January 14, 1970), did the Sixth Circuit err in failing to require prompt action during the current school year to eliminate the dual school system?

2. Did the Sixth Circuit err in determining that the Memphis system, in which 93% of the Negro pupils still attend racially identifiable schools (all-Negro or enrolling 90% or more Negro pupils), was a unitary school system meeting the requirements of this Court's decisions in *Brown* v. *Board of Educ.*, 347 U.S. 483 (1954); 349 U.S. 294 (1955); *Green* v. *County School Bd. of New Kent County*, 391 U.S. 430 (1968); *Alexander* and *Carter*?

Constitutional Provision Involved

This case involves the Equal Protection Clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Statement

History of the Litigation

Suit was originally filed under 28 U.S.C. §1343 and 42 U.S.C. §1983 to desegregate the Memphis City schools on March 31, 1960; the district court denied injunctive relief and upheld the Tennessee Pupil Assignment Law. On appeal, the Sixth Circuit reversed, with instructions to the district court "to restrain the defendants from operating a biracial school system in Memphis, or in the alternative to adopt a plan looking towards the reorganization of the schools in accordance with the Constitution of the United States." *Northcross* v. *Board of Educ. of Memphis*, 302 F.2d 818, 824 (6th Cir.), *cert. denied*, 370 U.S. 944 (1962).

On remand, the school district submitted, and the district court approved, a stair-step[1] plan incorporating geographic zoning and minority-to-majority transfers.[2] On appeal, the Sixth Circuit invalidated the minority-to-majority transfer feature and directed close scrutiny of all zone lines because it found substantial evidence that the boundaries approved by the district court had been "gerrymandered to preserve a maximum amount of segregation." *Northcross* v. *Board of Educ. of Memphis*, 333 F.2d 661, 663 (1964).

May 13, 1966, petitioners filed a Motion for Further Relief seeking the adoption of a new desegregation plan. A modified plan incorporating minimal zone changes[3] and unrestricted transfers was submitted by the respondents July 26

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[1] The original plan of desegregation affected grades 1-3 for the school year beginning September, 1962. Grade 4 was to be desegregated during the 1963-64 school year and one additional grade per year thereafter. The Sixth Circuit ordered the pace accelerated to desegregate junior high school grades in September, 1965 and senior high schools in the fall of 1966. 333 F.2d at 665.

[2] See *Goss* v. *Board of Educ. of Knoxville*, 373 U.S. 683 (1963).

[3] On May 15, 1969, the district court ruled that these same zones "are in need of revision for many purposes including further desegregation where feasible." (*Infra* p. 18a).

and approved by the district court without hearing July 29, 1966. The court made no ruling upon petitioners' Motion for Further Relief. A second Motion for Further Relief, based in part upon *Green* v. *County School Bd. of New Kent County*, 391 U.S. 430 (1968), was filed July 26, 1968, seeking (1) cancellation of all transfers which reduce desegregation in the school system,[4] (2) complete faculty desegregation, (3) a survey of the location of facilities, pupils, etc. with a complete report thereon submitted to the district court, (4) adoption of a new plan of desegregaton, prepared with the assistance of the Title IV Desegregation Center of the University of Tennessee, and based on unitary geographic zones, consolidation of schools or pairing, but without an unrestricted free transfer. The present proceedings arise from an appeal of the district court's May 23, 1969 ruling on the *Green* motion.

The Memphis School System

The Memphis school district lies but four miles north of the Mississippi state line in Shelby County, Tennessee.[5] The district operates some 149 schools; 92 of those schools are more than 90% white or 90% Negro:

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[4] *Compare Monroe* v. *Board of Comm'rs of Jackson*, 391 U.S. 450 (1968). Under the Memphis free transfer provision during the 1968-69 school year, 378 white students transferred from desegregated schools to all-white or heavily white schools; 563 white students transferred from all-Negro or predominantly Negro schools to all white or heavily white schools; and 526 Negro students transferred from predominantly white desegregated schools to predominantly Negro or all-Negro schools. (See *Transfer Report* for 1968-69, filed by respondents August 14, 1968).

[5] Shelby County is contiguous with Marshall County, Mississippi, where this Court on January 14, 1970 ordered complete desegregation of pupils and faculty no later than February 1, 1970. *Carter* v. *West Feliciana Parish School Bd.*, No. 944, O.T. 1969. In 1968-69 in Holly Springs (Marshall County), Mississippi, 3.2% of that district's Negro pupils attended predominantly white schools. *Anthony* v. *Marshall County Bd. of Educ.*, 409 F.2d 1287, 1288 (5th Cir. 1969). The comparable percentage in Memphis during 1968-69 was 2.7%. See text *infra*.

> [A]s of the current school year, 1968-69, there are presently thirty-five [35] all-white schools, fifty [50] all-Negro schools, forty-seven [47] predominantly white schools and seventeen [17] predominantly Negro schools.[6]

(*Infra*, p. 10a). Of the 66,555 Negro pupils in the system at the time of the February, 1969 hearing on the *Green* motion, only 1,842 (or 2.7%) attended schools where white students predominated; only 1,258 (2.2%) of Memphis' 57,707 white students attended predominantly Negro schools (Trial Exhibit No. 27, reprinted in the Appendix to the Motion for Summary Reversal). Statistics filed by respondents with the Sixth Circuit prior to the oral argument (*infra* at pp. 24a-31a) show little change during 1969-70. Of 70,925 Negro students in elementary, junior high and high schools, only 2,601 (3.5%) attend predominantly white schools; 49,821 (70.2%) attend all-Negro schools; and 65,967 (93%) attend schools which are more than 90% Negro. Meanwhile, the number of white students attending predominantly Negro schools has declined to 859 (1.4%) of the total 60,005 white students.

The District Court Ruling

Following the filing of the *Green* Motion July 26, 1968, the district court on August 23, 1968 declined to order any relief for the 1968-69 school year because of the imminent reopening of school.[7] No hearing on the motion was sched-

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[6] In 1960 there were 79, as compared with the present 72 all-white or predominantly white schools; and 44, as compared with the present 50 all-Negro and 17 predominantly Negro schools, in the Memphis system. *Northcross* v. *Board of Educ. of Memphis*, 302 F.2d 818, 820 (6th Cir. 1962).

[7] The district court deferred ordering the facilities and pupil surveys requested in the Motion for Further Relief pending receipt of briefs from respondents in support of their argument that *Green* was inapplicable. Hearings were held November 8 and 11, 1968

uled until after the survey report (see note 7) was filed by respondents on December 23, 1968. Thereafter, hearings were held from February 6-11, 1969; the district court's opinion rendered May 15, 1969, and a formal order entered May 23, 1969.

The district court held that "the existing and proposed plans do not have real prospects for dismantling the state-imposed dual system at the 'earliest practicable date'." (*Infra*, p. 18a). Nevertheless, the district court declined to void the free transfer system, even though respondents frankly admitted that they wished to retain free transfers to permit students to avoid integration if they wished to do so.[8] The court continued, "[t]he zones are in need of revi-

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to determine whether respondents should be required to make the surveys. On November 21, 1968, the district court ordered the studies to be undertaken and a report thereon filed within 45 days.

[8] See the Memorandum of Points and Authorities submitted by respondents to the district court and reprinted in the Appendix to petitioners' Motion for Summary Reversal. Trial Exhibit 6, also reprinted in that Appendix, demonstrates that this is exactly how the free transfers work. The following table depicts some examples:

Zone	*Whites Living in Zone*	*Whites Attending School in Zone*
Getwell Elementary	47	0
Gordon Elementary	130	33
Grant Elementary	51	0
Rozelle Elementary	217	98
Springdale Elementary	93	7
Vollentine Elementary	275	195
Corry Junior High	19	0
Humes Junior High	289	193
Riverview Junior High	36	0
Northside High	124	63
Melrose High	47	0

	Negroes Living in Zone	*Negroes Attending School in Zone*
Cherokee Elementary	274	151

(All students not attending school within their zones attend other *Memphis public schools*). (E.g., Tr. 408)

sion for many purposes, including further desegregation where feasible" (*infra*, at p. 18a).[9] Revised zone boundary

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[9] In 1964 the Court of Appeals pointed out two "obvious" examples of zones "gerrymandered to preserve a maximum amount of segregation": Klondike [Negro] and Vollentine [white] elementary school zones (which have a mutual boundary). *Northcross* v. *Board of Educ. of Memphis*, 333 F.2d at 663 (1964). Since that time no changes have been made in the zones (Tr. 374) and no white students attend the Klondike school.

Most zone boundaries between identifiably white and Negro school zones correspond directly to the racial distribution of the city's population (school boundary lines drawn by respondents follow historic boundary lines between white and Negro neighborhoods without regard to natural boundaries, capacities of schools, or any other criteria except race). (Tr. 40 et seq.) *Cf. Henry* v. *Clarksdale Municipal Separate School Dist.*, 409 F.2d 682, 687 (5th Cir.), *cert. denied*, 396 U.S. 940 (1969). (See Trial exhibits 7, 8, 9, 15, 16, 17 and 18). Examples are as numerous as they are flagrant.

For example, the Central High School zone [89% white] is bounded as follows: on the south by Hamilton [all-Negro] and Melrose [all-Negro]; on the west by Washington [all-Negro] and Northside [95% Negro]; on the north by Douglass [all-Negro]; and on the east by Lester [all-Negro]. The Central zone lines have no rational basis other than race. The zone is bisected by the following "natural" obstacles—in the north by the L & N railroad tracks and also by North Parkway, a major thoroughfare; in the south by the Union Pacific and L & N railroad tracks; in the west by Interstate Highway 255; and in the east by East Parkway, a major thoroughfare.

Another example is the Messick High School zone [99% white] which is bounded on the west by the Melrose High School zone [all-Negro]. The boundary separating these two zones is an irrational and jagged line which follows exactly the easternmost edge of a Negro neighborhood.

The elementary and junior high maps are also replete with similar examples of racial gerrymandering. The district court opinion (*infra* at p. 15a) notes "some glaring islands";

> For example, Carpenter Elementary, grades 1-3, and Lester Elementary, Junior High and High Schools have a total of 2396 students, all Negro. Treadwell and East High Schools have grades 1 through 12 and are immediately adjacent to the Lester-Carpenter zone. Treadwell has 2884 whites and 8 Negroes. East has 1866 white students and 19 Negroes. The defendants point out that the Lester-Carpenter "island" zone boundaries are necessary because of industrial and commercial

lines together with enrollment projections were to be filed January 1, 1970. The district court denied petitioners' prayer for an injunction restraining any further school construction until new zone lines were formulated and approved, and required only a 20% system-wide assignment of faculty across racial lines for 1969-70.

The Rulings of the Court of Appeals

June 13, 1968, petitioners filed with the United States Court of Appeals for the Sixth Circuit, a Motion for Summary Reversal of the district court's judgment. June 18, 1968, the Court of Appeals declined to consider the motion until the complete transcript of testimony was filed. The court reporter thereafter advised the Court of Appeals, upon instruction of the district judge and at the request of petitioners' counsel, that the transcript could not be prepared until September. A second motion renewing petitioners' request that the Court of Appeals proceed on the basis of the printed Appendix supplied with the motion and the exhibits forwarded from the district court was likewise denied by the Court of Appeals, although a major ground relied upon for summary reversal was the district court's failure to require new zone lines to be effectuated for 1969-70 after finding in May, 1969 that "the existing and proposed plans do not have real prospects for dismantling the state-imposed dual system at the 'earliest practicable date'" (*infra* at p. 18a).

Following this Court's decision in *Alexander* v. *Holmes County Bd. of Educ.*, 396 U.S. 19 (1969), petitioners filed with the Court of Appeals on November 3, 1969, a Motion to Require Adoption of a Unitary System Now (reprinted

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barriers, major thoroughfares and railroad tracks. The plaintiffs point out that these same tracks bisect other zones in other parts of the city.

at pp. 32a-35a *infra*). November 13, 1969, petitioners filed a Motion to Convene an Emergency Panel of the Sixth Circuit (reprinted at pp. 36a-38a *infra*) to hear and determine the *Alexander* motion. The following day, the transcript was received by the Court of Appeals; the convening of an emergency panel was denied and the *Alexander* motion passed for consideration by the regular panel of the Court which would hear the appeal, which was then calendared for argument December 17, 1969.

Following oral argument, the judgment of the Court of Appeals was issued December 19, 1969, remanding the case to the district court for further consideration of the Motion for Further Relief and the "plan"[10] or any amendment thereto to be presented to the district court as required by its order of May 23, 1969:

> It appears to this Court that the imminence of the presentation and consideration by the District Judge of the proposed plan to be submitted on or before January 1, 1970, suggests the impracticality of this Court attempting to consider *precipitously* the various claims asserted by plaintiffs-appellants in their appeal and motions. This Court has been familiar with the problems of desegregation in the schools of the City of Memphis since 1962, when it had before it the first judgment commanding desegregation, entered by the District Court on May 2, 1961. From review of this litigation and its underlying factual situation, it is satisfied that there is no need at this time for *precititous* [sic] action. Therefore, no further order need be entered in this Court until the United States District Court has had

[10] The district court did not require submission of a new plan, but merely revised zone boundary lines together with enrollment projections. It further did not call for any changes to be made until the 1970-71 school year.

> submitted to it the ordered plan, and has had opportunity to consider and act upon it. (*Infra*, p. 3a) (emphasis supplied).

Petitioners then filed a Motion for Injunction Pending Certiorari, praying that the Court of Appeals, pursuant to *Alexander* and to the December 13, 1969 order of this Court granting temporary relief in *Carter*, direct the district court to implement changes during the second semester of the current school year. January 12, 1970, the Court of Appeals denied the Motion for Injunction:

> Appellants support their motion with citation of authorities which they assert require the action they ask us to take, viz: *Alexander* v. *Holmes* [County] *Board of Education*, 398 U.S. 19; *Carter* v. *West Feliciana Parish School Board No. 944*, —— U.S. ——, December 13, 1969, 38 U.S.L. Week 3220; *Singleton* v. *Jackson Municipal Separate School District*, —— F(2) —— (5th Cir. 1969, No. 26,285); *Nesbit* v. *The Statesville City Board of Education*, —— F(2) —— (4th Cir. 1969, No. 13,229).
>
> To the extent that the relevant factual context of the above cases is disclosed by the opinions available to us, we conclude that they are not analogous to the case before us. We are satisfied that the respondent Board of Education of Memphis is not now operating a "dual school system" and has, subject to complying with the present commands of the District Judge, converted its pre-Brown dual system into a unitary system "within

which no person is to be effectively excluded because of race or color." (*Infra* at pp. 6a-7a).[11]

[11] *Compare* the findings of fact made by the district judge (*infra* at p. 18a):

> In this cause the Court finds that the defendant Board has acted in good faith as it interpreted its burden to desegregate the schools in its system. However, the existing and proposed plans do not have real prospects for dismantling the state-imposed dual system at the "earliest practicable date."
>
> . . .
>
> In dismantling the former state-imposed dual system at the earliest practicable date the Board should undertake to remove racial discrimination in all schools, not just the schools in the inner city.
>
> . . .
>
> The zones are in need of revision for many purposes including further desegregation where feasible.

REASONS FOR GRANTING THE WRIT

I.

The Failure of the Court of Appeals to Require any Action to Eliminate the Dual School System During the Current School Year Conflicts With This Court's Requirement in *Alexander* and *Carter* That Every School District Terminate Dual School Systems at Once and Operate Now and Hereafter Only Unitary Schools.

A. The Decision of the Court of Appeals Remanding the Case to the District Court With the Specific Direction That There Was No Need for Precipitous Action Conflicts With This Court's Decision in *Alexander* and *Carter*.

In *Alexander* and *Carter* this Court refused to permit delays in the complete conversion of school districts in Mississippi, Alabama, Georgia, Florida and Louisiana into unitary systems. One of the cases included in the *Carter* decision involved Marshall County, Mississippi, which adjoins the county in which the Memphis school system is located. As in *Alexander*, "the question presented is one of paramount importance involving as it does the denial of fundamental rights to many thousands of school children who are presently attending [Memphis, Tennessee] schools under segregated conditions contrary to the applicable decisions of this Court. . . ." But by accident of geography, this case falls within the jurisdiction of the Sixth Circuit Court of Appeals.

The rule in the Sixth Circuit for Memphis is "go slow." The district court is told he should not act "precipitously" in deciding the case. The rule is stated in the face of this Court's most recent decisions. The practice is far worse.

The *Green* motion filed in June of 1968 was not decided by the district court for almost a year and the denial by the Sixth Circuit of a hearing in a manner permitted by Rule 30(f) of the Federal Rules of Appellate Procedure for an additional six months makes a mockery out of the grant of Constitutional rights to Negro children. In *Green* v. *County School Board*, 391 U.S. 430 (1968) this Court spoke of such delay.

> Such delays are no longer tolerable, for "the governing constitutional principles no longer bear the imprint of newly enunciated doctrine." *Watson* v. *City of Memphis*, 373 U.S. 527 at 529.

The Sixth Circuit in its December 19, 1969 order made no mention of this Court's decision in *Alexander, supra*, despite petitioners' *Alexander* motion and their Reply Brief, which also fully discussed this Court's December 13, 1969 order in *Carter* v. *West Feliciana Parish School Bd.* and the ruling of the Fourth Circuit in *Nesbit* v. *Statesville City Bd. of Educ.*, No. 13,292 (December 2, 1969) (*en banc*).

If the practice and procedure followed in this cause is considered in the context of the Sixth Circuit's decision that there should be no precipitous action, it will put the district court below and all other district courts in the Sixth Circuit in the impossible situation of choosing between (1) the clear and precise decisions from this Court establishing the *pendente lite* relief principle for school desegregation cases and requiring that such cases proceed on an expedited basis in *all* courts without formalistic and technical delays which have the effect, as here, of a denial of relief, and (2) the *subsequent* decision of the Sixth Circuit Court of Appeals to the opposite effect. This is a case where there is no dispute that segregation was a

requirement of Tennessee state law and where the school district in question is less than four miles from another school district (Marshall County, Mississippi) in which this Court on January 14, 1970 ordered an end to all delay and the full desegregation of faculty and pupils no later than February 1, 1970.

B. The Conflict Between the Decision of the Sixth Circuit and Decisions of the Fourth, Fifth and Eighth Circuits Implementing *Alexander* Mandates Review by This Court.

On December 2, 1969 the Court of Appeals for the Fourth Circuit, sitting *en banc*, unanimously arrived at an interpretation of this Court's decision in *Alexander* which conflicts squarely with the interpretation and actions of the Court below. In *Nesbit* v. *Statesville City Bd. of Educ.*, No. 13,292 (December 2, 1969), the Fourth Circuit ordered school districts to submit unitary plans by December 8, 1969 for complete implementation no later than January 31, 1970.

> The clear mandate of the [Supreme] Court is immediacy. Further delays will not be tolerated in this Circuit. [Slip opinion at p. 2].

On January 19, 1970, that Circuit in *Stanley* v. *Darlington County School Dist.*, No. 13,904, reaffirmed its *Nesbit* holding and, citing this Court's January 14, 1970 holding in *Carter*, said:

> These decisions leave us with no discretion to consider delays in pupil integregation until September 1970. Whatever the state of progress in a particular school district and whatever the disruption which will be occasioned by the immediate reassignment of teachers and pupils in mid-year, there remains no judicial discretion to postpone immediate implementation of

the constitutional principles as announced in *Green* v. *County School Bd. of New Kent County*, 391 U.S. 430; *Alexander* v. *Holmes County Bd. of Educ.*, 396 U.S. 19 (Oct. 19, 1969); *Carter* v. *West Feliciana Parish School Bd.* —— U.S. —— (Jan. 14, 1970).[12]

The Fifth Circuit on January 21, 1970 entered a brief Order following reversal by this Court in *Carter*, adopting the January 14, 1970 opinion of this Court as its opinion on remand.

The Eighth Circuit in *Christian* v. *Board of Educ. of Strong School Dist. No. 83*, No. 20,038 (December 8, 1969), applied the *Alexander* rule in granting summary reversal and ordering the school district to file a plan by January 7, 1970 for complete desegregation at the beginning of the second semester of the current school year.

While the conflict between the decisions of this Court and the Sixth Circuit Court of Appeals provides a compelling case for action by this Court, the added and traditional ground of conflicting decisions among Courts of Appeals takes on dramatic importance here because of the nature of the constitutional rights involved and the proximity of school districts operating under exactly opposite determinations of the constitutional requirements.[13] A Negro child in Marshall County, Mississippi is granted his constitutional rights by order of this Court, while a Negro child across the county (and State) line a few miles away is denied these rights by the decision of a Court of Appeals. In view of the possible effect on all school districts, and in particular those within the Sixth Circuit, this Court cannot allow such different treatment to go uncorrected.

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[12] The entire order is reprinted *infra* at pp. 39a-42a.

[13] See Rule 19(1)(b) of the Rules of this Court.

In *Brown* v. *Board of Educ.*, 349 U.S. 294, 300 (1955), this Court enunciated a standard of action at "the earliest practicable date." Subsequent to *Alexander*, the Fifth Circuit in its *Singleton en banc* opinion delayed pupil integration until September, 1970 based upon a standard of "the earliest feasible date." Although this Court made clear in *Carter* that the rule must be *Alexander's*—"at once" and "now and hereafter"—the one year delay in the district court, the six month delay in the Court of Appeals, and the December 19, 1969 order establish a Sixth Circuit standard of "no precipitous action" which if unreversed renders *Alexander* and *Carter* nugatory within this Circuit.

II.

The Court of Appeals' January 19, 1970 Ruling That Memphis Now Operates a Unitary School System Directly Contradicts the Findings of the District Court and Conflicts With the Decisions of This Court From *Brown* to *Carter*.

On May 15, 1969, the district court found

> that the defendant [Memphis] Board has acted in good faith *as it interpreted its burden* to desegregate the schools in its system. *However, the existing and proposed plans do not have real prospects for dismantling the state-imposed dual* system at the "earliest practicable date."

(*Infra* at p. 18a) (emphasis supplied). Throughout the opinion, the district court characterizes Memphis as a "state-imposed dual system" which has not yet been disestablished, explicitly rejecting the claims of respondents that complete compliance with constitutional commands has been achieved:

> The defendant has compiled graphs and charts which indicate that 47,586 pupils within the system are attending schools with mixed racial enrollments. An examination of the enrollment figures shows that in some cases this includes a school wherein the ratio will be 1 white to 1822 Negro pupils, as in the case of Lincoln Junior High, and 1 Negro to 876 white pupils, as in the case of Treadwell Junior High. During the current year 71.5% of the Negroes attend all Negro schools.

(*Infra* at p. 11a). Petitioners' expert witness noted, for example, that nearly all Memphis high schools were either attended exclusively by students of one race or had but six or seven pupils of the minority race among total enrollments of 700 to 1000 pupils. The only exceptions were unzoned Memphis Technical High, Central High and Northside High, which was 4.8% white (Tr. 89-90).[14] In 1968-69, while 71.5% of Memphis' Negro pupils were in all-black schools, only 2.7% were in predominantly white schools, and only 2.2% of the white pupils were in predominantly Negro schools (Tr. 248).[15]

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[14] The district court opinion stated that "[a]s of the current school year, 1968-69, there are presently 35 all white schools, 50 all Negro schools, 47 predominantly white schools and 17 predominantly Negro schools." (*Infra* at p. 10a).

[15] The Superintendent decried this emphasis upon "statistics," and maintained that one student of a minority race among one thousand of the majority race made a facility a desegregated school (Tr. 340-42, 382). *Compare Green* v. *County School Bd. of New Kent County, supra; Jackson* v. *Marvell School Dist. No. 22*, 416 F.2d 380, 384 (8th Cir. 1969):

> "The admittance of 36 white students into a formerly all-Negro school still attended by 660 Negroes cannot be said to have the effect of casting off the school's racially identifiable cloak."

Other indicia of a continuing dual system were noted by petitioners' expert witness and the district court. From a comparison of the racial breakdown of pupils residing in adjacent zones, petitioners' witness concluded that the existing zone lines followed traditional boundaries between Negro and white neighborhoods (Tr. 40 *et seq.*), and the district court recognized the pattern:

> For example, Carpenter Elementary, grades 1-3, and Lester Elementary, Junior High and High Schools have grades 1 through 12 and are immediately adjacent to the Lester-Carpenter zone. Treadwell has 2884 whites and 8 Negroes. East has 1866 white students and 19 Negroes. The defendants point out that the Lester-Carpenter "island" zone boundaries are necessary because of industrial and commercial barriers, major thoroughfares and railroad tracks. The plaintiffs point out that these same tracks bisect other zones in other parts of the city.

(*Infra* at p. 15a). As of January 17, 1969, only 441½ of the 5,000 teachers in the system were in minority assignments, and many of these were not regular classroom teachers but those engaged in special programs (*infra* at p. 16a).

The district court concluded that in fact Memphis was not a unitary school system, and that further desegregation was required (although that court rejected some of petitioners' proposals to increase desegregation):

> In dismantling the former state-imposed dual system at the earliest practicable date the Board should undertake to remove racial discrimination in *all* schools, not just the schools in the inner city. . . .
>
> The zones are in need of revision for many purposes including further desegregation where feasible. . . .

> the Board should appoint a full time Director of Desegregation who shall be charged with investigating and recommending to the Board ways and means of assisting the Board in its affirmative duty to convert to a unitary system in which racial discrimination will be eliminated root and branch. . . . .
>
> The defendant Board in this case shall adopt a plan of faculty desegregation whereby supervisors, principals, teachers and other faculty personnel shall be employed, promoted and assigned in furtherance of a goal of removing the racial identity of each school, but no teachers shall be discharged from the system to correct a racial imbalance.
>
> An interim target for this goal shall be that at least 20% of the teachers in the system will be assigned to racially minority faculty positions in the year 1969-70. This percentage shall be systemwide and shall not necessarily require 20% in each school in 1969-70.[16]

(*Infra* at pp. 18a-22a).

Nevertheless, the Court of Appeals made no ruling on petitioners' claims that the district court should have voided Memphis' free transfer provision,[17] required immediate re-

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[16] No further faculty desegregation has yet been required by the district court.

[17] Petitioners' expert witness noted the general pattern that in zones with substantial Negro pupil resident population, the white student enrollment in schools located in those zones was considerably less than the white pupil resident population. See n. 8-*supra*. The district court declined to limit transfers to those which would increase desegregation because it found the influence of the free transfer provision upon the racial composition of the schools to be equivocal. Petitioners argued below that the free transfer provision facilitates avoidance of integration by students and parents opposed to it. *Compare Monroe* v. *Board of Comm'rs of Jackson*, 391 U.S. 450 (1968).

drawing of zone lines,[18] accelerated faculty desegregation and adopted the suggestions of petitioners' expert witness for interim steps to substantially increase desegregation in the Memphis school system.[19] In response to petitioners' argument[20] that these things were required, and were required *now* by the *Alexander* and *Carter* decisions, the Sixth Circuit in its January 12, 1970 order held these de-

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[18] In 1964 the Sixth Circuit found substantial evidence that the Klondike and Vollentine zones were "gerrymandered to preserve a maximum amount of segregation," required them redrawn and all zones scrutinized for the same purpose. 333 F.2d at 664. No change was made in the Klondike-Vollentine boundary (Tr. 374) nor, generally, in any of the zone lines (Tr. 150, 224-25). The district court found rezoning necessary (*infra* at p. 18a) but delayed requiring submission of new zone lines until January, 1970, setting no date for implementation of new zone lines.

[19] Petitioners' expert witness suggested that a detailed study carried out over some time would result in long-range plans to increase desegregation in Memphis (Tr. 104-07) but that there were a number of feasible interim alternatives which could have been effectuated in the fall of 1969 (Tr. 98-104) to move towards the goal of a completely unitary system: (1) redrawing of zone boundary lines at all levels (see also Tr. 49), (2) cancellation of the open transfer policy, (3) institution of a majority-to-minority transfer only, (4) suspension of all planned construction pending restudy to determine consonance with desegregation, (5) increased faculty desegregation—at least 30% in minority positions for 1969-70, (6) public relations programs to promote acceptance of more than token desegregation, (7) assistance of the University of Tennessee Title IV Center, and (8) pairings of schools to increase desegregation (Tr. 61-65).

[20] The Sixth Circuit refers in its order to the suggestion during oral argument that one measure of whether a unitary school system had been achieved was the degree to which each school has a pupil population racially reflective of the total system pupil population:

> We have expressed our own view that such a formula for racial composition of all of today's public schools is not required to meet the requirement of a unitary system.

(*Infra* at p. 7a). This hardly compels the conclusion, however,

cisions "not analogous" because "respondent Board of Education of Memphis is not now operating a 'dual school system' . . .". The genesis of this holding is difficult to discern. On December 19, 1969, the Sixth Circuit had remanded the case to the district court without impeaching the lower court's finding that there was still a dual school system in Memphis, advising only that the facts did not, in the Sixth Circuit's view, call for "precipitous action." Certainly the 1969-70 enrollment statistics presented to the Court of Appeals prior to its first ruling indicated no change from 1968-69. In fact, they show (*infra* at pp. 24a-31a) less desegregation than the previous year. 115,748, or 88.4% of Memphis' 130,930 students in grades 1-12 attend schools enrolling less than 10% students of the opposite race. Only 2,601 (3.5%) of 70,925 Negro students attend predominantly white schools; 49,821 (70.2%) attend all-Negro schools and 65,927 (93%) attend schools which are more than 90% Negro. The number of white students attending predominantly Negro schools has declined to 859 (1.4% of 60,005 white pupils). Integration in Memphis is still largely token: 55,037, or 88%, of the 68,091 students whom respondents claim attend integrated schools attend schools enrolling less than 10% students of the opposite race. 82.8% of the white students and 76.5% of the Negro students in what respondents term "integrated" schools attend classes with less than 10% students of the opposite race.

These figures hardly call for "no precipitous action," let alone "no action at all." Yet that is exactly the implication

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that no further desegregation at all is required in Memphis.

Petitioners also argued below, as they do here, that 93% of all Negro students attending Negro schools is a certain indicator that a unitary school system has not been achieved.

of the holding below that Memphis has achieved a unitary school system.[21]

Seven years ago this Court told the Negro citizens of Memphis that

> [t]he [constitutional] rights here asserted are, like all such rights, *present* rights; they are not merely hopes to some *future* enjoyment of some formalistic constitutional promise. The basic guarantees of our Constitution are warrants for the here and now and, unless there is an overwhelmingly compelling reason, they are to be promptly fulfilled. The second *Brown* decision is but a narrowly drawn, and carefully limited, qualification upon usual precepts of constitutional adjudication and is not to be unnecessarily expanded in application.

Watson v. *City of Memphis*, 373 U.S. 526, 533 (1963) (emphasis in original). *Alexander* and *Carter* decisively eliminated even that narrow and limited qualification. Yet if the determination of the Sixth Circuit—that a state-created dual school system is converted to a unitary system despite assignment of 93% of its Negro students to schools which are more than 90% Negro—is permitted to stand, the district court in this case and every other district court in this Circuit will be entirely without guidance. The entire history of school desegregation from *Brown* to *Carter* will have been for naught in the Sixth Circuit. The ten years of litigation by petitioners seeking to enforce the constitutional rights of Negro pupils in the City of Memphis will have

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[21] The Sixth Circuit has consistently been apart from other circuits in its application of *Green* and other cases which state a requirement of affirmative action on the part of school boards to eliminate all aspects of the dual system so that school shall no longer be racially identifiable. *See, e.g., Goss* v. *Board of Educ. of Knoxville*, 406 F.2d 1183 (6th Cir. 1969).

been an expensive exercise in futility, yet another example of the law's promise broken. The fundamental error below as well as the fulfilment of the promise of *Brown* and of *Alexander* require an order providing for effective procedures to insure action *now* to establish a unitary school system in Memphis.

CONCLUSION

Petitioners respectfully pray that a writ of certiorari to the United States Court of Appeals for the Sixth Circuit be issued, that the judgment below be summarily reversed with direction to require respondents to prepare, with the assistance of HEW or the HEW-funded University of Tennessee Title IV Center, a plan of complete pupil and faculty integration affecting all phases of the operations of the Memphis public school system to be implemented during the 1969-70 school year immediately following the order of this Court.

Respectfully submitted,

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Court of Appeals' December 19, 1969 Order

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 19,993

DEBORAH A. NORTHCROSS, *et al.*,

Plaintiffs-Appellants

v.

BOARD OF EDUCATION of the Memphis, Tennessee, City Schools,

Defendants-Appellees.

ORDER

Before WEICK and CELEBREZZE, Circuit Judges, and O'SULLIVAN, Senior Circuit Judge.

THIS CAUSE is before this Court upon the appeal of plaintiffs-appellants from an order and judgment of the United States District Court for the Western District of Tennessee, Western Division, and upon motions of plaintiffs-appellants denominated Motion for Summary Reversal and Motion to Require Adoption of Unitary System Now. These Motions requested us to hear the appeal and said motions without waiting the filing in this Court of a full transcript of the proceedings underlying the order from which the appeal is taken. However, this Court, on its own motion, advanced the hearing of the cause and it was submitted to a panel of this Court on December 17, 1969, upon briefs, oral argument and a partial transcript.

Court of Appeals' December 19, 1969 Order

This case has been before us previously on two occasions. In *Northcross v. Board of Ed. of City of Memphis*, 302 F(2) 818 (6th Cir. 1962); *cert. denied*, 370 U.S. 944, we held that the Tennessee Pupil Assignment Law was ineffective as a desegregation plan and restrained the Board from operating a bi-racial school system in Memphis, or in the alternative to adopt a plan looking toward the reorganization of the schools and to retain jurisdiction.

Upon the remand, the District Court ordered desegregation of the Memphis Schools in accordance with a plan of desegregation. On appeal, we held the transfer provision of the plan invalid, and required the Board to justify all existing zone lines. *Northcross v. Board of Ed. of City of Memphis*, 333 F(2) 661 (6th Cir. 1964). Subsequent thereto the District Court approved a modified plan for desegregation. Other proceedings were had, including consideration of a Motion for Further Relief, upon which the order before us on appeal was entered.

The District Judge, in an opinion covering fourteen pages of the record, gave consideration to the application for further relief by the plaintiffs-appellants, and in his opinion directed that further steps be taken for improvement of the progress of desegregation in the schools of the City of Memphis. His opinion, however, states:

> "In this cause the Court finds that the defendant Board has acted in good faith as it interpreted its burden to desegregate the schools in its system."

His opinion further requires that steps be taken to fully comply with the requirements of desegregation as to both pupils and faculty. His opinion calls for the appointment by the School Board of an administrative officer designated Director of Desegregation, to direct and cooperate in the

carrying out of a supplemental plan heretofore proposed by the Memphis Board of Education. His opinion further commands:

> "Prior to January 1, 1970, the Board will file in this cause maps showing the revised zone boundary lines and will file enrollment figures by race of the pupils actually attending the schools as of the time of the report and enrollment figures by race of the pupils who live in the proposed revised zones. The Court will then consider the adequacy of the revised zone boundaries and will reconsider the adequacy of the transfer plan for future years in accordance with the holding of the Supreme Court that district courts should retain jurisdiction to insure that a constitutionally acceptable plan is operated 'so that the goal of a desegregated, non-racially operated school system is rapidly and finally achieved.'"

It appears to this Court that the imminence of the presentation and consideration by the District Judge of the proposed plan to be submitted on or before January 1, 1970, suggests the impracticality of this Court attempting at this time to consider precipitously the various claims asserted by plaintiffs-appellants in their appeal and motions. This Court has been familiar with the problems of desegregation in the schools of Memphis since 1962, when it had before it the first judgment commanding desegregation, entered by the District Court on May 2, 1961. From review of this litigation and its underlying factual situation, it is satisfied that there is no need at this time for precipitous action. Therefore, no further order need be entered in this Court until the United States District Court has had submitted to it the ordered plan, and has had opportunity to consider and act upon it.

Court of Appeals' December 19, 1969 Order

NOW, THEREFORE, IT IS HEREBY ORDERED that this cause be, and it is, hereby remanded to the United States District Court for the Western District of Tennessee, Western Division, for further consideration of the plaintiffs-appellants' petition for further relief, and the plan, or any amendment thereto, to be presented to the District Court as required by its order of May 23, last.

Entered by order of the Court.

/s CARL W. REUSS,
Carl W. Reuss
Clerk

Court of Appeals' January 12, 1970 Order

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 19,993

DEBORAH A. NORTHCROSS, *et al.*,

Plaintiffs-Appellants,

—v.—

BOARD OF EDUCATION of the Memphis, Tennessee, City Schools,

Defendants-Appellees.

ORDER

Before WEICK and CELEBREZZE, Circuit Judges, and O'SULLIVAN, Senior Circuit Judge.

This Cause is now before this Court upon appellants' Motion for Injunction Pending Certiorari. Such pleading evidences plaintiffs' purpose to apply to the United States Supreme Court for a writ of certiorari to review an order of this Court entered in this cause on December 19, last. This litigation relates to the sufficiency of desegregation of the public schools of Memphis, Tennessee. By our order of December 19, we remanded this case to the United States District Court for the Western District of Tennessee. Such remand was for the purpose of providing District Judge Robert M. McRae, Jr., with opportunity to consider whether a plan, heretofore required by him to be filed on or before January 1, 1970, would conform to the commands of an order and opinion of said District Judge relating to further

desegregation of the Memphis schools. Such order and opinion are the subject of the appeal disposed of by our remand.

The motion now before us asks the immediate issuance of an injunction which will require:

> "1) The District Court to order the appellee City of Memphis Board of Education to prepare and file on or before January 5, 1970, in addition to the adjusted zone lines it is presently required to file, a plan for the operation of the City of Memphis 'public' schools as a unitary system during the current 1969-70 school year.
>
> "2) Appellants further move the Court that it issue its injunction requiring the District Court to hold hearings on any objections to the proposed plan no later than January 9, 1970; requiring it to issue its decision no later than January 14, 1970, with same to be filed with the Clerk of the Court of Appeals and providing for review by this Court upon motion of the parties made within ten days of entry of the order on such papers as are then available in the record of the District Court."

Appellants support their motion with citation of authorities which they assert require the action they ask us to take, viz: *Alexander v. Holmes Board of Education*, 396 U.S. 19; *Carter v. West Feliciana Parish School Board No. 944*, ___ U.S. ___, December 13, 1969, 38 U.S.L. Week 3220; *Singleton v. Jackson Municipal Separate School District*, ___ F(2) ___ (5th Cir. 1969, No. 26,285); *Nesbit v. The Statesville City Board of Education*, ___ F(2) ___ (4th Cir. 1969, No. 13,229).

Court of Appeals' January 12, 1970 Order

To the extent that the relevant factual context of the above cases is disclosed by the opinions available to us, we conclude that they are not analogous to the case before us. We are satisfied that the respondent Board of Education of Memphis is not now operating a "dual school system" and has, subject to complying with the present commands of the District Judge, converted its pre-Brown dual system into a unitary system "within which no person is to be effectively excluded because of race or color." In *Alexander v. Holmes Board of Education, supra*, the Supreme Court exposed the question then before it as involving:

> "the denial of fundamental rights to many thousands of school children who are presently attending Mississippi schools under segregated conditions contrary to the applicable decisions of this Court."

This quotation is not descriptive of the present situation of Memphis. For the school year 1969-70, there are approximately 134,000 children enrolled in the schools of Memphis, of which approximately 60,000 are white and 74,000 are Negroes. Upon the oral argument of this appeal, we asked counsel for plaintiffs to advise what he considered would be the "unitary system" that should be forthwith accomplished in Memphis. He replied that such a system would require that in every public school in Memphis there would have to be 55% Negroes and 45% whites. Departures of 5% to 10% from such rule would be tolerated. The United States Supreme Court has not announced that such a formula is the only way to accomplish a "unitary system". We have expressed our own view that such a formula for racial composition of all of today's public schools is not required to meet the requirement of a unitary system. *Deal*

v. *Cincinnati Board of Education* (Ohio schools) 369 F(2) 55 (6th Cir. 1966), *cert. denied*, 389 U.S. 847 (1967); *Mapp* v. *Board of Education*, (Tennessee schools), 373 F(2) 75, 78 (6th Cir. 1967); *Goss* v. *Knoxville Board of Education* (Tenn. schools) 406 F(2) 1183 (6th Cir. 1969); *Deal* v. *Cincinnati Board of Education*, (Ohio schools) —— F(2) —— (6th Cir. 1969).

The District Judge's opinion in this case evidences his awareness of today's requirements for school desegregation and his purpose to require strict obedience by the Memphis Board of Education to all of such requirements. We are advised that the plan which he required to be filed by January 1, 1970, is now before him. We are satisfied that he will consider it with appropriate dispatch, to the end that any deficiencies in the plan now in operation in Memphis will be corrected.

Our own familiarity with the progress of desegregation in the Memphis schools and our confidence in the District Judge to whom we have remanded this litigation suggests that it is not now needed that we issue the injunction asked.

The Motion for Injunction Pending Certiorari is denied.

Entered by order of the Court.

CARL W. REUSS
Clerk

District Court's May 15, 1969 Opinion

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TENNESSEE,

WESTERN DIVISION

No. 3931—Civil

DEBORAH A. NORTHCROSS, *et al.*,

Plaintiffs,

vs.

BOARD OF EDUCATION OF THE MEMPHIS CITY SCHOOLS, *et al.*,

Defendants.

OPINION

The plaintiffs in this cause filed a Motion for Further Relief based upon a ruling of the Supreme Court in *Green* v. *School Board of New Kent County, Virginia*, 391 U.S. 430; *Raney* v. *Board of Education, Gould School District*, 391 U.S. 443; and *Monroe* v. *Board of Commissioners of Jackson, Tennessee*, 391 U.S. 450, all dated May 27, 1968. Plaintiffs sought by their motion the cancellation of transfers and the requirement of additional desegregation of faculty members for the 1968-69 school year, an order of the court requiring a survey and report and a modification of the plan of desegregation heretofore entered in this cause on July 29, 1966. The application for immediate relief pertaining to the 1968-69 school year was heard and ruled upon by the Honorable Bailey Brown, Chief Judge of this

district. On November 8, 1968, a further hearing was had and this Court ordered the defendants to compile and furnish a report for the Court's further consideration concerning the plan of desegregation of the defendants. After the report was filed, the Court conducted a three-day hearing on the adequacy of the existing plan and proposed modification thereof. Proof was offered by the plaintiffs wherein it was asserted that the defendants have not and, under the existing plan, would not perform their affirmative duty of desegregating the former dual system of schools as required by the *Green*, *Raney* and *Monroe* cases.

The defendant School Board is elected by the voters in the City of Memphis to operate a school system which presently has an enrollment of 123,280 students: 65,170 of them are Negro and 58,110 are white. It operates a total of 149 elementary, junior high and high schools and it employs approximately 5200 teachers. The defendant school system is one of the largest single systems in the United States. By some standards it is considered twelfth in the nation. The instant suit was filed in March 1960 and there have been numerous proceedings in both the District Court and the Court of Appeals pertaining to this case. The last order in the cause before the present motion was filed was entered on July 29, 1966. This provided for a plan of desegregation which divided the defendant system into separate geographic zones at the elementary, junior high and high school levels. Pupils within the system have been assigned to the respective zones and have been allowed to transfer under a system whereby free transfers are permitted subject to space in the respective schools. As of the current school year, 1968-69, there are presently 35 all white schools, 50 all Negro schools, 47 predominantly white schools and 17 predominantly Negro schools. This is

based upon information furnished by the defendant school system as set forth in Trial Exhibit #6, wherein the current enrollment and pupil population based upon students residing in each attendance zone is set forth. For convenience of the Court, this was compiled on the basis of elementary schools, junior high schools and high schools. For promotion and record keeping purposes the system operates an elementary school of six grades, junior high of three grades and high school of three grades.

The defendant has compiled graphs and charts which indicate that 47,586 pupils within the system are attending schools with mixed racial enrollments. An examination of the enrollment figures shows that in some cases this includes a school wherein the ratio will be 1 white to 1,522 Negro pupils, as in the case of Lincoln Junior High, and 1 Negro to 876 white pupils, as in the case of Treadwell Junior High. During the current year 71.5% of the Negroes attend all Negro schools. In certain schools within the system there is a more equal mixing of the races, as in the case of Pope Elementary School, where the enrollment indicates there are 325 white pupils and 372 Negro pupils. It is interesting to note that pupils who reside in this zone number 230 white pupils and 256 Negro pupils. The proof, including maps which reflect the racial residential concentrations in the City of Memphis, shows that the Negro population is heavily concentrated in the older parts of the city and generally in a westwardly direction. Very few white citizens reside in these areas. In the extreme northern, eastern and southern portions of the city the racial concentration of the residents is overwhelmingly white. Within the geographic center of the city there is a predominantly white area ringed by mixed or Negro neighborhoods. Within this center area are located the more fa-

segregated schools, including Technical High School which has the highest high school ratio of mixed enrollment.

The system does not furnish transportation for its pupils except in unusual circumstances. The various buildings have been located on a neighborhood plan whereby an attempt has been made to provide for every student in the city a school as conveniently located as possible, taking into consideration such factors as the age of the students, natural boundaries in the form of major thoroughfares and other relevant factors.

The testimony reflects that the system is bussing some white students to overcome temporary problems. In the southeastern portion of the city some high school students have been bussed in a relatively new zone during the establishment of a new school in which a new grade has been added each year. This bussing will be complete this year. In the northwestern portion of the city some students in an all white elementary school zone are bussed to avoid a hazardous railroad crossing. This will be discontinued when an overpass is available for the use of those young pupils.

The system has no power to impose taxes. Its funds for operating expenses and capital improvements must be allocated by the City Council. Therefore, the Board is competing with all other phases of the city government for its necessary funds.

The system has been and is faced with the problem of providing school facilities to students who live in newly annexed areas which were formerly located in Shelby County outside the city limits. This usually requires new construction because the County system provides transportation for some of its students.

A plan which would require the defendants in this cause to provide transportation on a system wide basis in order

to effectuate substantial desegregation is not economically feasible. However, this Court is of the opinion that bussing which would result in further desegregation would be appropriate in preference to permanent additions to schools when population shifts have created or will likely create under capacity schools in one zone and over crowded schools in other zones.

The proof reflects that Getwell Elementary School is a school presently attended by 56 Negroes and no whites. It is in a recently annexed area in the southeastern portion of the city which is not densely populated. The geographic area of the zone includes 47 Negro pupils and 18 white pupils. The school is a legacy through annexation from the county. The area does not justify building a new school now but the pupils must be provided schools. The cost per pupil for 1967-68 was $822.63 in this school when it had 76 pupils. In its post hearing brief the defendant indicated that the school would be closed next year. This should be done.

The primary thrust of the plaintiffs' proof and argument is that transfers should be cancelled, thereby increasing desegregation. The defendants assert that resegregation will occur through ingration by whites from zones integrated above a "tilt" point of 30% Negro.

It is apparent from the proof that the cancellation of all transfers will not effect the racial make-up of many schools because of the segregated housing patterns in different sections of the city which are miles apart. Undoubtedly, this is due in a large measure to economic factors over which the defendant Board has no control.

By way of illustration, certain phases of the high school enrollment and zone population figures by races are summarized herein. There are exclusive of the technical high

District Court's Bench Opinion

1965 to the school has 844 Negroes and no white pupils. In the case of Longview Elementary School, in 1965 there were 322 whites and 261 Negroes, whereas in 1968 there are 1280 Negroes and 16 whites. These changes primarily were caused by changes in neighborhood racial patterns. In addition to racial changes, some of the zones have diminishing numbers of school-age students and hence are operating at under capacity. Fairview Junior High had 1501 students in 1965-66 and now has only 476. The school is still approximately 75% white. An examination of the racial residential density map and zone figures shows that the inner city is the area where the most significant desegregation does and will occur in the near future unless a massive busing system is installed. Within this general area some glaring islands appear. For example, Carpenter Elementary, grades 1-6, and Lester Elementary, Junior High and High Schools have a total of 2396 students, all Negro. Treadwell and East High Schools have grades 1 through 12 and are immediately adjacent to the Lester Carpenter zone. Treadwell has 2884 whites and 8 Negroes. East has 1501 white students and 10 Negroes. The statistics point out that the Lester Carpenter "island" zone boundaries are gerrymandered because of industrial and commercial barriers, major thoroughfares and railroad tracks. The plaintiffs point out that these same tracks bisect other zones in other parts of the city.

The defendant's initial response to the pending Motion for Further Relief was a complete defense of its present system. During this hearing the Board offered a Supplemental Plan which proposed that the defendant Board appoint a Director of Intercultural Education who shall be charged with the responsibility of formulating plans and programs for intercultural and cross-cultural [illegible]

basis on a biracial basis. This would include temporary principal and teacher exchanges and pupil exchanges in various areas, including vocational training, arts and crafts, academic courses and music and debate.

Faculty desegregation in the defendants' system was first undertaken in the school year 1966-67, when faculty members were assigned as members of a minority race in the schools which had formerly had total white faculties and total Negro faculties under the dejure system of segregated schools. In 1967-68 the number of minority assignments was 226. After the pending motion was filed in July 1968, and before the opening of school for the current year, the defendant system, upon the suggestion of the Honorable Bailey Brown, made additional minority reassignments so that every school in the system but one had a member of the minority race on its faculty. Since the beginning of the school year additional minority assignments have been made so that the total, as of January 15, 1969, was 441[1]. Plaintiffs have introduced proof that 57 of the 183 white teachers in the minority race situations are in various special assignments such as Title I teachers and ROTC instructors. Whereas, 19 of the 247 Negro teachers in minority situations are in similar special programs.

The method of faculty desegregation prior to the filing of the pending motion was highly selective resulting in a small percentage of the total faculty assignments being minority race assignments. The planning programs and the meetings which bring faculty members from different schools together have been upon a desegregated basis, and there have been other desegregation efforts such as temporary assignment. Six Negro principals in predominantly white schools and recently a printed leaflet setting forth steps and suggestions in the area of desegregated faculties and schools

However, special programs and seminars to encourage and prepare all teachers for substantial desegregation of faculties have not been conducted.

In *Green v. County School Board, supra*, the Supreme Court said:

> "The obligation of the district courts, as it always has been, is to assess the effectiveness of a proposed plan in achieving desegregation. There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance. It is incumbent upon the school board to establish that its proposed plan promises meaningful and immediate progress toward disestablishing state-imposed segregation. It is incumbent upon the district court to weigh that claim in light of the facts at hand and in light of any alternatives which may be shown as feasible and more promising in their effectiveness. Where the court finds the board to be acting in good faith and the proposed plan to have real prospects for dismantling the state-imposed dual system 'at the earliest practicable date,' then the plan may be said to provide effective relief. Of course, the availability to the board of other more promising courses of action may indicate a lack of good faith; and at the least it places a heavy burden upon the board to explain its preference for an apparently less effective method. Moreover, whatever plan is adopted will require evaluation in practice, and the court should retain jurisdiction until it is clear that the state-imposed segregation has been completely removed." (Emphasis added)

391 U.S. at p. 439



should be reconsidered and revised annually in the light of all relevant factors, including the Board's affirmative duty to eliminate racial discrimination.

The Board should appoint a full time Director of Desegregation who shall be charged with investigating and recommending to the Board ways and means of assuring the Board of its affirmative duty to convert to a unitary system in which racial discrimination will be eliminated root and branch. *Green v. County School Board, supra*, at pp. 437-438. One of the specific assignments shall be a revision of zone boundary lines. Factors to be considered in addition to more effective desegregation shall be the capacities of the schools, the location of students, the location of existing school facilities and the safety of the students, including natural boundaries, railroad crossings and thoroughfares.

For the year 1969-70 the present transfer system will be followed except that the Board will incorporate in its plan and appropriately announce a specific provision whereby all transfers requested by students from a zone in which they are in a racial majority to a zone in which they will be in a racial minority will be allowed regardless of reason and subject only to lack of space to a degree whereby the transfer would interfere with the elimination process.

Prior to January 1, 1970, the Board will file at this cause a plan showing the revised zone boundary lines and will file enrollment figures by race of the pupils actually attending the schools as of the time of the report and enrollment figures by race of the pupils who live in the proposed revised zones. The Court will then consider the adequacy of the revised zone boundaries and will reconsider the adequacy of the Board's plan for future years in accordance with the holding of the Supreme Court, the district courts

should retain jurisdiction to insure that a constitutionally acceptable plan is operated "so that the goal of a desegregated non-racially operated school system is rapidly and finally achieved." *Rogers v. Board of Education, supra*, at p. 449.

The Director of Desegregation shall also promulgate and plan biracial activities as proposed in the Supplemental Plan of the Board, with particular emphasis on those schools which are not desegregated.

New Schools, additions to existing schools and the use of portable class rooms shall be programmed, planned and constructed in furtherance of the Board's affirmative duty to convert to a unitary system free from racial discrimination and in accordance with other factors such as financial limitations, location of students, age level of the students, safety of the students and other relevant non-racial factors. In the good faith performance of this affirmative duty, the Board should be particularly mindful of the 1967 report of the United States Commission on Civil Rights (Racial Isolation in the Public Schools), wherein it is reported on page 61:

> "Site Selection. — As noted in the discussion of Northern schools, the location of new school has a marked effect on patterns of isolation. Whether a school system uses geographical zoning, free choice, or a variation on these methods of assignment, a key determinant of the resident racial composition is the location of the school.
>
> "At the time of the Brown decision, Southern educators were aware that the location of schools was an important factor in maintaining segregated school attendance patterns. A story in a Memphis, Tenn., newspaper on May 18, 1954, is illustrative:

> "'Ruling Fails to Shock City; Officials See Little Difficulty
>
> "'School authorities in Memphis yesterday evidenced no surprise at the [Brown] decision . . . Mr. Millard Bowers, Sr., President of the Memphis Board of Education, said, "We have been expecting this to happen a long while . . . We believe our Negroes will continue using their own school facilities since most of them are located in the center of Negro population areas. . . . [Negro schools are] fully equal to, and in some instances [better than white schools]. We are very optimistic about this [ruling]."'

In this regard it should be noted that the defendant Board recently voluntarily closed Patterson School, which had been a Negro school, thereby encouraging those students to attend White Station School which is a predominantly white school located in the immediate vicinity of the former Patterson School.

In *U. S. A. v. Greenwood Municipal Separate School District*, 406F2 1086 (C. A. 5, Feb. 4, 1969) the court said:

> "The school board must put its shoulder to the wheel and assume the burden in integrating the faculty and staff of each school. The transformation to a unitary system will not come to pass until the board has balanced the faculty of each school so that no faculty is identifiable as being tailored for a heavy concentration of Negro or white students. . . . To assure compliance it is evident that the district judge will have to announce interim targets and conduct subsequent hearings to determine what progress is being made."

The defendant Board in this case shall adopt a plan of faculty desegregation whereby supervisors, principals, teachers and other faculty personnel shall be employed, promoted and assigned in furtherance of a goal of removing the racial identity of each school, but no teachers shall be discharged from the system to correct a racial imbalance.

An interim target for this goal shall be that at least 30% of the teachers of the system will be assigned to racially minority faculty positions in the year 1969-70. This percentage shall be systemwide and shall not necessarily require 20% in each school in 1969-70.

Teachers shall be assigned on the basis of certification and qualification for the academic subjects or grade level to be taught. Assignments to racially minority faculties shall not be left to the choice of the teacher. *Monroe v. Board of Commissioners*, 380 F2d 955 (C.A. 6, 1968).

The Board shall have properly trained personnel conduct appropriate seminars and programs for *all* teachers in the system to prepare *all* faculty personnel for desegregated faculties. In this regard the properly trained personnel may be from within or without the system, provided they are properly trained for that purpose and are dedicated to a program of desegregated faculties.

The above shall constitute the findings of fact and conclusions of law of this Court as contemplated by Rule 52 of the Federal Rules of Civil Procedure. Counsel for the defendants shall promptly file a revised plan which shall incorporate therein the provisions of the existing plan and the supplemental plan which are not inconsistent with this opinion and shall also incorporate therein such additional provisions that are required by this opinion. A separate form of judgment incorporating the contents of this opinion

and the revised plan shall also be filed by counsel for the defendants.

This 15th day of May, 1969.

/s/ Robert M. McRae, Jr.
Robert M. McRae, Jr.
United States District Judge

A True Copy:

Attest:

W. Lloyd Johnson, *Clerk*
By /s/ J. B. Crockett, *D.C.*

1969-70 Enrollment Statistics

MEMPHIS CITY SCHOOLS

Enrollment Data

School Year 1969-70

Recap of figures compiled from second attendance report dated October 23, 1969.

INTEGRATED TOTALS:

	White	*Negro*	*Total*	
Kindergarten	156	194	350	
Special Ed.	1098	448	1546	
Elementary	25368	11647	37015	
Junior Hi	11946	5984	17930	
Senior Hi	9673	3473	13146	
	48241	21746	69987	52.1%

NON-INTEGRATED TOTALS:

Kindergarten	50	529	579	
Special Ed.	75	794	869	
Elementary	5842	27144	32986	
Junior Hi	3632	12853	16485	
Senior Hi	3544	9824	13368	
	13143	51144	64287	47.9%

COMBINED TOTALS:

Kindergarten	206	723	929
Special Ed.	1173	1242	2415
Elementary	31210	38791	70001
Junior Hi	15578	18837	34415
Senior Hi	13217	13297	26514
	61384	72890	134274
	45.7%	54.3%	

Department of Pupil Services
jh (12-12-69)

ENROLLMENT DATA—MEMPHIS CITY SCHOOLS—ATTENDANCE REPORT ENDING 10-23-69

School	14 Kindergarten White	14 Kindergarten Negro	45 Special Ed. White	45 Special Ed. Negro	59 Elementary White	59 Elementary Negro	25 Junior Hi White	25 Junior Hi Negro	15 Senior Hi White	15 Senior Hi Negro	Total
Airways Jr.	—	—	37	—	—	—	342	109	—	—	488
Avon	—	—	13	6	298	41	—	—	—	—	358
Bellevue Jr.	—	—	19	5	—	—	384	276	—	—	684
Bethel Grove	—	—	9	1	142	296	—	—	—	—	448
Bruce	14	11	—	—	338	129	—	—	—	—	492
Campus	—	—	22	—	524	12	—	—	—	—	558
Central	—	—	—	—	—	—	—	—	951	219	1170
Charjean	—	—	—	—	629	8	—	—	—	—	637
Cherokee	19	6	16	2	622	212	—	—	—	—	877
Colonial El.	—	—	—	—	728	6	—	—	—	—	734
Cromwell	25	—	—	—	477	2	—	—	—	—	504
Cypress Jr.	—	—	—	—	—	—	1	1573	—	—	1574
Delano	—	—	—	—	396	2	—	—	—	—	398
Denver	—	—	35	1	673	2	—	—	—	—	711
Dunbar	—	25	—	—	1	779	—	—	—	—	805
East El.	—	—	—	—	589	14	—	—	—	—	603
East Hi	—	—	—	—	—	—	621	6	607	9	1243
Fairview Jr.	—	—	—	—	—	—	268	149	—	—	417
Frayser Hi	—	—	—	—	—	—	942	—	999	1	1942
Ga. Hills El.	—	—	—	—	789	3	—	—	—	—	792
Ga. Hills Jr.	—	—	31	1	—	—	607	23	—	—	662
Goodlett	—	—	—	—	920	1	—	—	—	—	921
Gordon	—	—	—	—	16	716	—	—	—	—	732

Integrated in Spec. Ed. only

School	Kindergarten White	Kindergarten Negro	Special Ed. White	Special Ed. Negro	Elementary White	Elementary Negro	Junior Hi White	Junior Hi Negro	Senior Hi White	Senior Hi Negro	Total
Gragg	—	—	45	1	309	5	348	1	—	—	709
Grahamwood	—	—	63	2	525	4	—	—	—	—	594
Grant	—	25	—	—	1	662	—	—	—	—	688
Guthrie	—	—	8	20	125	664	—	—	—	—	817
Hawkins Mill	21	4	40	1	369	85	—	—	—	—	520
Hill, A. B.	—	25	24	3	1243	—	—	—	—	—	1295
Humes Jr.	—	—	6	24	—	—	61	1386	—	—	1477
Idlewild	—	—	11	6	447	51	—	—	—	—	515
Jackson	—	—	—	—	436	1	—	—	—	—	437
Knight Road	25	—	51	—	702	1	—	—	—	—	779
LaRose	—	25	1	122	—	1453	—	—	—	—	1601
Lawler	—	—	—	—	149	2	—	—	—	—	151
Lenox	—	—	38	6	89	2	—	—	—	—	135
Levi (1-8)	—	—	11	1	328	162	83	39	—	—	624
Longview (1-5)	—	—	—	—	6	1361	—	—	—	—	1367
Longview (6-8)	—	—	—	31	—	—	3	898	—	—	932
Macon	—	—	—	—	466	5	—	—	—	—	471
Mallory Hts.	—	—	3	9	60	412	—	—	—	—	484
Maury	—	—	—	—	175	40	—	—	—	—	215
Merrill	—	25	—	—	32	379	—	—	—	—	436
Messick (1-6)	—	—	—	—	342	103	—	—	—	—	445
Messick (7-12)	—	—	—	—	—	—	403	67	1117	29	1616
Northside	—	—	5	23	—	—	—	—	26	1360	1414
Oakhaven El.	—	—	11	—	1013	2	—	—	—	—	1026
Oakhaven Hi	—	—	12	1	—	—	600	1	495	—	1109
Oakville	—	—	—	—	218	38	—	—	—	—	256
Peabody	—	—	30	5	384	53	—	—	—	—	472

School	Kindergarten White	Kindergarten Negro	Special Ed. White	Special Ed. Negro	Elementary White	Elementary Negro	Junior Hi White	Junior Hi Negro	Senior Hi White	Senior Hi Negro	Total
Pine Hill	—	—	—	30	1	321	—	—	—	—	352
Pope	—	—	6	9	211	472	—	—	—	—	698
Prospect	—	—	—	—	3	279	—	—	—	—	282
Richland El.	—	—	—	—	826	2	—	—	—	—	828
Richland Jr.	—	—	—	—	—	—	646	17	—	—	663
Riverview El.	—	—	—	—	3	1218	—	—	—	—	1221
Riverview Jr.	—	—	—	17	—	—	1	875	—	—	893
Rozelle	2	23	6	17	47	670	—	—	—	—	765
Sea Isle	25	—	56	—	1005	4	—	—	—	—	1090
Shady Grove	—	—	22	—	620	20	—	—	—	—	662
Sharpe	—	—	—	—	452	7	—	—	—	—	459
Sheffield (7-12)	—	—	—	—	—	—	623	27	391	14	1055
Sherwood El.	24	1	75	—	880	43	—	—	—	—	1023
Sherwood Jr.	—	—	52	5	—	—	1197	49	—	—	1303
Shrine	—	—	19	27	29	25	18	6	8	1	133
Snowden (1-9)	—	—	—	—	557	22	495	93	—	—	1167
South Park	—	—	93	—	415	1	—	—	—	—	509
South Side (9-12)	—	—	—	20	—	—	2	274	6	1480	1782
Springdale	1	24	—	—	12	462	—	—	—	—	499
Tech	—	—	—	—	—	—	—	—	592	243	835
Treadwell El.	—	—	—	—	1134	1	—	—	—	—	1135
Treadwell (7-12)	—	—	28	—	—	—	819	3	864	8	1722
Trezevant (7-12)	—	—	—	—	—	—	869	6	824	16	1715
Vollintine	—	—	14	23	142	262	—	—	—	—	441
Wells Station	—	—	21	—	718	1	—	—	—	—	740
Westside El.	—	—	25	—	820	10	—	—	—	—	855
Westwood El.	—	—	17	1	1450	23	—	—	—	—	1491

School	Kindergarten White	Kindergarten Negro	Special Ed. White	Special Ed. Negro	Elementary White	Elementary Negro	Junior Hi White	Junior Hi Negro	Senior Hi White	Senior Hi Negro	Total
Westwood (7-12)	—	—	—	—	—	—	723	40	631	43	1437
White Sta. El.	—	—	57	22	313	93	—	—	—	—	485
White Sta. (7-12)	—	—	1	6	—	—	761	52	1386	50	2256
Whitney	—	—	22	—	236	1	—	—	—	—	259
Willow Oaks	—	—	43	—	933	2	—	—	—	—	978
Wooddale	—	—	—	—	—	—	1129	14	776	—	1919
	156	194	1098	448	25368	11647	11946	5984	9673	3473	69987

INTEGRATED TOTALS:

Kindergarten	156	194	
Special Ed.	1098	448	
Elementary	25368	11647	
Junior Hi	11946	5984	
Senior Hi	9673	3473	
	48241	21746	= 69987

Department of Pupil Services
jh (12-12-69)

ENROLLMENT DATA—MEMPHIS CITY SCHOOLS—ATTENDANCE REPORT ENDING 10-23-69

School	23 Kindergarten White	23 Kindergarten Negro	26 Special Ed. White	26 Special Ed. Negro	40 Elementary White	40 Elementary Negro	19 Junior Hi White	19 Junior Hi Negro	12 Senior Hi White	12 Senior Hi Negro	Total
	2	21	2	24	8	32	3	16	3	9	—
Alcy	—	—	—	—	—	766	—	—	—	—	766
Berclair	25	—	—	—	553	—	—	—	—	—	578
Brookmeade	—	—	—	—	909	—	—	—	—	—	909
Caldwell	—	—	—	—	—	1662	—	—	—	—	1662
Carnes	—	25	—	26	—	706	—	172	—	—	929
Carpenter	—	—	—	—	—	331	—	—	—	—	331
Carver	—	—	—	—	—	—	—	989	—	1190	2179
Chicago Park	—	25	—	—	—	588	—	—	—	—	613
Colonial Jr.	—	—	—	—	—	—	1594	—	—	—	1594
Corning	25	—	—	—	386	—	—	—	—	—	411
Corry Rd.	—	—	—	—	—	—	—	1055	—	—	1055
Cummings	—	26	—	24	—	1126	—	—	—	—	1176
Douglass El	—	25	—	19	—	954	—	—	—	—	998
Douglass (7-12)	—	—	—	37	—	—	—	675	—	1081	1793
Dunn	—	24	—	—	—	542	—	—	—	—	566
Evans	—	—	—	—	977	—	—	—	—	—	977
Florida	—	—	—	29	—	1175	—	—	—	—	1204
Ford Rd. (1-7)	—	26	—	28	—	839	—	167	—	—	1060
Fox Meadows	—	—	—	—	843	—	—	—	—	—	843
Frayser El.	—	—	—	—	468	—	—	—	—	—	468
Geeter El.	—	—	—	7	—	408	—	—	—	—	415
Geeter (7-12)	—	—	—	14	—	—	—	271	—	420	705
Georgia Ave.	—	—	—	92	—	1754	—	—	—	—	1846

School	Kindergarten White	Kindergarten Negro	Special Ed. White	Special Ed. Negro	Elementary White	Elementary Negro	Junior Hi White	Junior Hi Negro	Senior Hi White	Senior Hi Negro	Total
Grandview Hts.	—	—	30	—	861	—	—	—	—	—	891
Hamilton El.	—	25	—	—	—	1294	—	—	—	—	1319
Hamilton (7-12)	—	—	—	—	—	—	—	1439	—	1789	3228
Hanley	—	26	—	58	—	1451	—	—	—	—	1535
Hollywood	—	—	—	—	—	874	—	—	—	—	874
Hyde Park	—	25	—	40	—	1450	—	—	—	—	1515
Kansas	—	25	—	—	—	949	—	—	—	—	974
Kingsbury El.	—	—	45	—	845	—	—	—	—	—	890
Kingsbury (7-12)	—	—	—	—	—	—	1477	—	1429	—	2906
Klondike	—	25	—	129	—	673	—	—	—	—	827
Lakeview	—	27	—	7	—	443	—	136	—	—	613
Lauderdale	—	25	—	6	—	718	—	—	—	—	749
Leath	—	25	—	84	—	711	—	—	—	—	820
Lester El.	—	25	—	13	—	896	—	—	—	—	934
Lester (7-12)	—	—	—	—	—	—	—	578	—	484	1062
Lincoln El.	—	25	—	19	—	765	—	—	—	—	809
Lincoln Jr.	—	—	—	28	—	—	—	1779	—	—	1807
Locke	—	25	—	—	—	1051	—	—	—	—	1076
Magnolia	—	25	—	—	—	1035	—	—	—	—	1060
Manassas	—	—	—	—	—	—	—	1208	—	1025	2233
Melrose (7-12)	—	—	—	17	—	—	—	1258	—	1131	2406
Mitchell (8-12)	—	—	—	26	—	—	—	723	—	836	1585
Norris	—	—	—	—	—	620	—	—	—	—	620
Orleans	—	25	—	—	—	831	—	—	—	—	856
Overton	—	—	—	—	—	—	—	—	1735	—	1735
Porter	—	—	—	29	—	—	—	2270	—	—	2299
Shannon	—	—	—	—	—	957	—	—	—	—	957

School	Kindergarten White	Kindergarten Negro	Special Ed. White	Special Ed. Negro	Elementary White	Elementary Negro	Junior Hi White	Junior Hi Negro	Senior Hi White	Senior Hi Negro	Total
Stafford	—	25	—	—	—	551	—	—	—	—	576
Walker (1-7)	—	—	—	11	—	681	—	113	—	—	805
Washington	—	—	—	21	—	—	—	—	—	1868	1889
Weaver (1-7)	—	—	—	—	—	152	—	20	—	—	172
Westside (7-12)	—	—	—	—	—	—	561	—	380	—	941
Wisconsin	—	25	—	30	—	191	—	—	—	—	246
	50	529	75	794	5842	27144	3632	12853	3544	9824	64287

NON-INTEGRATED TOTALS:

Kindergarten	50	529
Special Ed.	75	794
Elementary	5842	27144
Junior Hi	3632	12853
Senior Hi	3544	9824
	13143	51144 = 64287

Department of Pupil Services
jh (12-12-69)

Motion to Require Adoption of Unitary System Now

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 3931

DEBORAH A. NORTHCROSS, *et al.*,

Appellants,

VS.

BOARD OF EDUCATION OF THE MEMPHIS CITY SCHOOLS,

Appellees.

Come now the appellants and respectfully move the Court for an order directing the immediate and total desegregation of the City of Memphis School system. In support of said motion, appellants would respectfully show unto the Court:

1. The United States Supreme Court on October 29, 1969, in the case of *Alexander* v. *Holmes County Board of Education,* No. 632, held that school districts which previously operated dual school systems based on race or color must begin *immediately* to operate as unitary school systems within which no person is to effectively be excluded from any school because of race or color.

2. The Supreme Court charged the Court of Appeals before whom a case is pending with the responsibility for requiring the school system to be operated as a unitary system under its own order and that during the period

under which a school system is so operated, the District Court may hear and consider objections thereto or proposed amendments thereof while the order of the Court of Appeals remains in effect, but no changes may be made in such an order requiring the operation of a unitary system until such change has been passed upon by the Court of Appeals.

3. Appellants filed their Motion for Summary Reversal of the decision of the District Court on June 13, 1969. It remains pending before this Court but has not been heard.

4. As of the school year, 1968-69, there were 35 all-white schools, 50 all-Negro schools, 47 predominantly white schools, and 17 predominantly Negro schools in the City of Memphis. In fact, 92 schools in the City of Memphis are either all Negro or all white or have less than 10% of their pupils from students of the opposite race of the majority of the students in the school. The language of the District Court was "during the current year, 71.5% of the Negroes attend all-Negro schools." The situation for the 1969-70 term remains virtually the same.

5. Under the order of the District Court, schools remain identifiable in terms of their faculty as being tailored for white or black students in that the majority of schools still do not reflect the racial composition of the faculty and staff in the system.

6. The Court's order does not enjoin construction of new schools pending the institution of new zone lines.

7. The District Court found "However, the existing and proposed plans do not have real prospects for dismantling the state imposed dula system at the 'earliest practicable

date.'" Despite this finding, the Court in its May 15, 1969, decision did not require the institution of new zone lines for the beginning of the 1969-70 school term. It delayed the filing of new zone lines until January, 1970.

WHEREFORE, Appellants move this Court to enter its order without hearing in conformance with the decision of the Supreme Court of the United States on October 29, 1969 requiring:

1. Adoption of a new plan of desegregation within ten days including the institution of new zone lines, based upon geographic zoning, pairing of schools, non-contiguous zones, and cross transportation of pupils to achieve desegregation of all-Negro or all-white schools wherever necessary, thereby eliminating all-white and all-black schools, leaving only unitary "schools" operated by the appellee Board of Education.

2. The institution of said plan of desegregation eliminating all-black and all-white schools and leaving only unitary schools forthwith in accordance with the opinion of the United States Supreme Court in *Alexander* v. *Holmes County Board of Education*, supra.

3. Reassignment forthwith of faculty and staff so that each school within a margin of 10% reflects the ratio of Negro and white teachers in the system.

4. Enjoin further construction pending adoption of the new pattern of school organization.

5. Eliminate the "free transfer" provision approved by the District Court.

Respectfully submitted,

/s/ Louis R. Lucas
Louis R. Lucas
525 Commerce Title Building
Memphis, Tennessee 38103

Jack Greenberg
Norman Chachkin
10 Columbus Circle
New York, New York 10019

Certificate of Service

The undersigned hereby certifies that a copy of the foregoing Motion for Adoption of Unitary System has been served upon counsel for the appellee, Jack Petree at his office, 900 Memphis Bank Building, Memphis, Tennessee, by depositing a copy of same in the United States mail, postage prepaid, this 3rd day of November, 1969.

/s/ Louis R. Lucas
Louis R. Lucas

Motion to Convene Emergency Panel

IN THE

UNITED STATES COURT OF APPEALS

FOR THE WESTERN DISTRICT OF TENNESSEE

No. 3931

DEBORAH A. NORTHCROSS, *et al.*,

Appellants,

VS.

BOARD OF EDUCATION OF THE MEMPHIS CITY SCHOOLS,

Appellees.

Come now the appellants through their undersigned counsel and respectfully move the Court to convene an emergency panel of the Sixth Circuit Court of Appeals for the purpose of consideration and ruling on the motion filed by appellants pursuant to the decision of the United States Supreme Court in *Alexander* v. *Holmes County Board of Education*, No. 632, October term, 1969 (Oct. 29, 1969), which opinion requires the court of appeals before whom a school desegregation case is pending to act forthwith and require school districts which previously operated dual school systems based on race or color to begin *immediately* to operate as unitary school systems. In the language of the opinion, "every school district . . . to terminate dual systems *at once*, and to operate now and hereafter only unitary schools." (emphasis supplied).

In support of said motion appellants would respectfully show unto the court that there has been on file with this court since June, 1969, a Motion for Summary Reversal of the order of the district court which order failed to pro-

vide for the operation of a unitary school system in the City of Memphis public schools by the start of the 1969-70 school term. Appellants further show that this court declined to hear the motion for summary reversal pending receipt of the transcript of the trial testimony; It was further submitted to the court by written motion a copy of a letter from the court reporter for the United States District Court written at the request of the district judge advising that becuase of the press of other business, such a transcript could not be made available until after the start of the school term. This second motion asked this court to act without benefit of transcript; The court declined to act, thereby denying appellants relief for the start of the 1969-70 school term. Despite the requirement of the Sixth Circuit rules of a response to motions within seven days, appellees have filed no response to any of the pending motions.

Appellants are advised that this court in consideration of the latest pending motion to "Adopt a Unitary System Now" still awaits the receipt of a transcript prior to a hearing or decision on the summary motions pending before it. Appellants have been advised by the Clerk of the Court of Appeals that he has been advised to set the matter for hearing on the court's December docket and that the Court still requires the submission of the transcript. It is respectfully submitted that the delay envisioned by a setting sometime during the December term of the court does not meet the requirements of *Alexander* v. *Holmes County Board of Education, supra,* and may result in further delays constituting a denial of appellants' rights under the Constitution and laws of the United States.

Wherefore, appellants respectfully submit that the court should convene an emergency panel of the court prior to

the December term for the purpose of decision with or without a hearing based upon the records already available to the court which include the decision of the district court, a lengthy motion for summary reversal and a printed appendix to said motion containing reproductions of exhibits filed with the district court as well as a reproduction of the district court's opinion. That said panel order the immediate establishment of a unitary school system in the City of Memphis without awaiting receipt of transcript, briefs, or arguments of counsel.

Respectfully submitted,

/s/ Louis R. Lucas
Louis R. Lucas
Ratner, Sugarmon, Lucas & Willis,
525 Commerce Title Building
Memphis, Tennessee 38103

Jack Greenberg
Norman Chachkin
10 Columbus Circle
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Certificate of Service

This is to certify that a copy of the foregoing Motion has been served on counsel for the appellee, Mr. Jack Petree, at his office, 900 Memphis Bank Building, Memphis, Tennessee, this 13th day of November, 1969.

/s/ Louis R. Lucas
Louis R. Lucas

En Banc Fourth Circuit Decision

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 13,904

THEODORE WHITMORE STANLEY, *et al.*,

Appellants,

VERSUS

DARLINGTON COUNTY SCHOOL DISTRICT, *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, AT FLORENCE. J. ROBERT MARTIN, JR., DISTRICT JUDGE.

No. 13,905

ELAINE WHITTENBERG, *et al.*,

Appellants,

VERSUS

SCHOOL DISTRICT OF GREENVILLE COUNTY, ETC., *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, AT GREENVILLE. J. ROBERT MARTIN, JR., DISTRICT JUDGE.

En Banc 4th Circuit Decision

ORDER

We consolidated these appeals for hearing and disposition in light of *Alexander* v. *Holmes County Bd. of Educ.*, 396 U.S. 19 (Oct. 29, 1969), and *Nesbit* v. *Statesville City Bd. of Educ.*, —— F.2d —— (4th Cir., Dec. 2, 1969).

In *Alexander* the Supreme Court held that "the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools." In *Carter* v. *West Feliciana Parish School Bd.*, —— U.S. —— (Jan. 14, 1970), the Supreme Court re-emphasized the immediacy of its holding in *Alexander*. It vacated an order of the United States Court of Appeals for the Fifth Circuit, sitting en banc, permitting pupil integration to be deferred until the opening of the new school year in September 1970. The Court of Appeals for the Fifth Circuit was held to have misconstrued the Supreme Court's decision in *Alexander*, and complete student integration was held to be required in those cases by February 1, 1970.

These decisions leave us with no discretion to consider delays in pupil integration until September 1970. Whatever the state of progress in a particular school district and whatever the disruption which will be occasioned by the immediate reassignment of teachers and pupils in midyear, there remains no judicial discretion to postpone immediate implementation of the constitutional principles as announced in *Green* v. *County School Board of New Kent County*, 391 U.S. 430; *Alexander* v. *Holmes County Bd. of Educ.*, 396 U.S. 19 (Oct. 29, 1969); *Carter* v. *West Feliciana Parish School Bd.*, —— U.S. —— (Jan. 14, 1970).

Accordingly, it is ADJUDGED, ORDERED AND DECREED:

1. Each of the school districts shall submit to the District Court a plan for unitary schools on or before January 23, 1970;

A. The plan for *Darlington* may be based upon proposal B submitted by the Department of Health, Education and Welfare, or upon any other plan that will create a unitary school system;

B. The plan for *Greenville* may be based upon the revised plan submitted by the school board or upon any other plan that will create a unitary school system;

C. All plans must include provisions for the integration of the faculty so that the ratio of Negro and white faculty members of each school shall be approximately the same as the ratio throughout the system. In determining the ratio, exceptions may be made for specialized faculty positions;

2. The plaintiffs and the Department of Health, Education, and Welfare may file responses to the plans on or before January 28, 1970;

3. The District Judge will conduct a hearing in each of these cases on February 2, 1970 to enable him to determine the effectiveness of the proposed plans and to consider any objections which may have been filed;

4. On or before February 5, 1970, the District Judge shall enter an order in each of these cases approving a plan selected by him to attain a unitary school system and requiring its implementation on February 9, 1970, with leave, however, to postpone the effective date of the implementa-

tion of all or any part of a particular plan until February 16, 1970, if for good cause shown the District Judge finds that, to the extent that such postponement of implementation of the plan is allowed, it could not be achieved earlier.

5. The District Court's order shall not be stayed pending any appeal which may be taken to this court, but, in the event of an appeal, modification of the order may be sought in this court by a motion accompanied by a request for immediate consideration.

The judgments are vacated and the cases remanded for further proceedings consistent with this order.

Let the mandate issue forthwith.

By direction of the Court:

CLEMENT F. HAYNSWORTH, *Jr.*,
United States Circuit Judge

A True Copy, Teste:

SAMUEL W. PHILLIPS, *Clerk*

By /s/ JOANN C. KIRKPATRICK
Deputy Clerk